

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

IN RE WASHINGTON MUTUAL  
MORTGAGE BACKED SECURITIES  
LITIGATION,

This Document Relates to: ALL CASES

Master Case No. C09-037 MJP

[Consolidated with: Case Nos.  
CV09-0134 MJP, CV09-0137 MJP, and  
CV09-01557 MJP]

**DEFENDANTS' SUPPLEMENTAL  
BRIEF TO KEEP PORTIONS OF  
EXPERT REPORT OF PROF.  
CHRISTOPHER M. JAMES UNDER  
SEAL**

*Defendants' Supplemental Brief to Keep Portions of  
Expert Report of Prof. Christopher M. James Under  
Seal: (CV09-037 MJP) - 1*

**HILLIS CLARK MARTIN & PETERSON P.S.**  
1221 Second Avenue, Suite 500  
Seattle, Washington 98101-2925  
Telephone: (206) 623-1745  
Facsimile: (206) 623-7789

Defendants respectfully submit this Supplemental Brief to Keep Portions of Expert Report of Prof. Christopher M. James (“James Report”) Under Seal pursuant to this Court’s Order on Motion to Seal (July 8, 2011, Dkt. No. 266). With this motion, Defendants have filed a redacted version of the James Report, with redactions to the following marked portions: ¶¶ 54, 59, 60, 68, 69, 70, 76, 79, 80, 82, 83, 85, 97, 117, f Ex. 3, Ex. 15(A), 15(B), 15(C), 15(D) and Ex. 25.

Pursuant to the Paragraph 16(b) of the Stipulated Protective Order and Stipulated Order Regarding the “Clawback” of Documents (the “Protective Order”) (Dkt No. 213), and applicable law, Plaintiffs bear the burden, in a response to this Supplemental Brief, of justifying the sealing or redacting of material that they have designated as “Confidential.” This includes ¶¶ 54, 59, 68, 69, 70, 82, 106 and 117 of the James Report, which contain excerpts from the deposition transcripts of Marangal Domingo, Mario Rodriguez, Anne Zissu and Scott Hakala. In this Supplemental Brief, Defendants provide the grounds for filing under seal material designated as “Confidential” by third parties and by Defendants, or that contain other sensitive and protected information, in the following portions of the James Report: ¶¶ 60, 76, 83, 85, 97, Ex. 3, Ex. 15 and Ex. 25.

## I. STATEMENT OF FACTS

On July 8, 2011, this Court issued its Order on Motion to Seal, which granted in part and denied in part Defendants’ Motion to Seal. The Court held that deposition transcripts, which were designated as “Confidential” by Plaintiffs and their investment advisors, were not protected from disclosure by the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 *et seq.*) because the testimony did not contain nonpublic personal information relating to specific transactions or a consumer of a financial institution. (*See, e.g.*, Order on Motion to Seal at 2.) The Court did, however, find that excerpts of the deposition of John Van Tassel contained nonpublic information specific to

1 Chicago Police Annuity and Benefit Fund (“Chicago PABF”) and directed that those pages  
2 should be kept under seal. (*Id.* at 4.) Pursuant to the Order, on July 14, 2011, Defendants refiled  
3 Exhibits G, I, J, K, L and M, with portions of I redacted as ordered. On July 15, 2011, Plaintiffs  
4 filed a Motion to Seal Certain Portions of Exhibit H (Dkt No. 272).

5  
6 Pursuant to the Order, Defendants respectfully submit this supplemental brief to keep  
7 portions of the James Report under seal. Concurrently with this brief, Defendants have filed a  
8 redacted version of the James Report. The redacted portions that Defendants bear the burden of  
9 defending should be kept under seal pursuant to the Gramm-Leach-Bliley Act because they  
10 contain nonpublic information that relate to specific transactions or consumers of third party  
11 financial institutions or Defendants. For example, ¶¶ 76, 85, 97, Ex. 3 and Ex. 15 contain trading  
12 data or specific information regarding consumers that were identified by third party financial  
13 institutions subpoenaed by Plaintiffs; ¶ 83 and Ex. 25 contain portions of confidential agreements  
14 and trading data, and identify consumers that entered into whole loan purchase agreements with  
15 Defendants; ¶ 60 contains quotations from the deposition of John Van Tassel, an investment  
16 advisor to Plaintiff Chicago PABF, regarding nonpublic information specific to Chicago PABF.  
17 This Court has already granted Plaintiffs’ motion to seal portions of the expert report of Anne  
18 Zissu, containing trading data and revealing information about consumers obtained from third  
19 party financial institutions through subpoenas (Order on Pls. Mot. to Seal, Dkt. No. 237), and has  
20 directed that portions of the Van Tassel deposition should remain under seal because they contain  
21 nonpublic information specific to Chicago PABF. (Order on Defs.’ Mot. to Seal, Dkt No. 266.)  
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## II. ARGUMENT

### A. STANDARD OF REVIEW

Paragraph 16 of the Protective Order and Local Rule 5(g)(3) provide that a party must obtain the Court's authority to file documents under seal by filing a motion to seal. Under Ninth Circuit precedent, "compelling reasons" must be shown for the sealing of most judicial records because of the common law right to inspect and copy public records and documents, including judicial records and documents. *See Pintos v. Pac. Creditors Assoc.*, 605 F.3d 665, 678 (9th Cir. 2010) (citing *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) and *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003)). Under the compelling reasons standard, the party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings ... outweigh the general history of access and the public policies favoring disclosure." *Pintos*, 605 F.3d 678 (citing *Kamakana*, 447 F.3d at 1172).

### B. PORTIONS OF THE JAMES REPORT CONTAINING TRADING DATA AND IDENTITIES OF CONSUMERS SHOULD BE SEALED BECAUSE THEY ARE PROTECTED BY THE GRAMM-LEACH-BLILEY ACT

The financial institutions that have produced customer information containing trade data are required under federal law to protect consumers' financial information. The Gramm-Leach-Bliley Act (the "Act") provides that financial institutions have affirmative and continuing obligations to protect the security and confidentiality of their customers' nonpublic personal information. *See* 15 U.S.C. § 6801. "Nonpublic personal information" is defined as personally identifiable financial information provided by a consumer to a financial institution, resulting from any transaction with the consumer or any service performed for the consumer or otherwise obtained by the financial institution. 15 U.S.C. § 6809(4)(A). It does not include publicly

1 available information. 15 U.S.C. § 6809(4)(B). Section 313.3(p)(1) of title 16 of the Code of  
 2 Federal Regulations defines “publicly available information” as any information that one has a  
 3 reasonable basis to believe is lawfully made available to the general public from: (1) federal,  
 4 state, or local government records; (2) widely distributed media; or (3) disclosures to the general  
 5 public that are required to be made by federal, state or local law.  
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7 Paragraphs 60, 76, 83, 85, 97, Ex. 3, Ex. 15 and Ex. 25 to the James Report contain  
 8 nonpublic personal information provided by third party financial institutions. For example, ¶¶ 76,  
 9 85, 97 list particular trades made by the financial institutions’ customers. The identities of the  
 10 customers of each of the subpoenaed third-party financial institutions are not “publicly available”  
 11 and are subject to the Act’s privacy protections. Therefore, the third party financial institutions  
 12 here have a continuing obligation to protect the security and confidentiality of their customers’  
 13 nonpublic, personal information. Indeed, these parties agreed to provide information to Plaintiffs  
 14 based upon the understanding that such information would be subject to the Protective Order.  
 15 (See Decl. of Kenneth Rehns in Supp. of Pls.’ Mot. to Seal, Dkt. No. 225, at ¶ 2.) This Court has  
 16 already granted Plaintiffs’ motion to seal such third party information presented in their expert’s  
 17 report, holding that “privacy of [the] information” produced by third party financial institutions,  
 18 including the third parties that produced trade data in this matter, “outweighs the public’s interest  
 19 in reviewing the material.” (Order on Motion to Seal, Dkt. No. 237, at 1:21-2:1.)  
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23 The same rationale extends to ¶ 83 and Ex. 25 to the James Report, which contain  
 24 nonpublic information regarding Defendants’ customers’ whole loan purchases, including the  
 25 identity of the customers, certain confidential or proprietary information and the terms of the  
 26 purchase agreements. (You Decl. in Supp. of Mot. to Seal, Dkt. No. 251, at ¶ 4.) These  
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documents and information are nonpublic and should be sealed pursuant to the Act, and because the terms were privately negotiated between the parties to the agreements. (*Id.*)

The redacted portions of ¶ 60 to the James Report contain excerpts from the deposition of John Van Tassel regarding nonpublic information specific to Chicago PABF. In its Order on Motion to Seal, this Court has directed that portions of Van Tassel deposition should remain under seal because they contain nonpublic information specific to Chicago PABF. (Dkt No. 266 at 4.) Paragraph 60 of the James Report should likewise be kept under seal because it contains nonpublic information specific to Chicago PABF, namely, its secondary bond purchase strategy.

**C. SEALING THESE DOCUMENTS WILL NOT HAMPER THE PUBLIC’S UNDERSTANDING OF THE JUDICIAL PROCESS AND WILL PREVENT MISUSE BY THIRD PARTIES**

Sealing the identities of the financial institutions, the identities of their customers, and the whole loan purchase agreements will neither hamper nor threaten the public’s interest in understanding the judicial process because Defendants’ proposed redactions comprise only a small portion of the James Report. Thus, the public’s interest in understanding Plaintiffs’ claims against Defendants, and its interest in understanding the judicial process by which these claims will be evaluated, will not be impaired by the granting of this motion. Furthermore, granting this motion will prevent third parties from misusing, manipulating, or otherwise exploiting confidential information contained in the sealed documents, including the identities, investment strategies, proprietary processes, and confidential agreements of third parties and their customers. (*See You Decl. in Supp. of Mot. to Seal at ¶ 5.*)

**III. CONCLUSION**

For the reasons set forth above, the Court should seal the designated excerpt of ¶¶ 60, 76, 83, 85, 97, Ex. 3, Ex. 15 and Ex. 25 to the James Report. A proposed order is attached.

DATED this 18th day of July, 2011.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Brian C. Free

Louis D. Peterson, WSBA #5776

Brian C. Free, WSBA #35788

Hillis Clark Martin & Peterson P.S.

1221 Second Avenue, Suite 500

Seattle WA 98101-2925

Telephone: (206) 623-1745

Facsimile: (206) 623-7789

Email: ldp@hcmp.com; bcf@hcmp.com

OF COUNSEL

ADMITTED PRO HAC VICE

BINGHAM MCCUTCHEN LLP

David M. Balabanian

John D. Pernick

Frank Busch

Three Embarcadero Center

San Francisco, CA 94111-4067

Telephone: (415) 393-2000

Facsimile: (415) 393-2286

Email: david.balabanian@bingham.com;

john.pernick@bingham.com;

frank.busch@bingham.com

Attorneys for Defendants

WaMu Asset Acceptance Corporation, WaMu

Capital Corporation, David Beck, Diane Novak,

Rolland Jurgens and Richard Careaga

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Floyd Abrams - fabrams@cahill.com

Michael H. Barr - mbarr@sonnenschein.com

Walter Eugene Barton -

gbarton@karrtuttle.com, nrandall@karrtuttle.com, danderson@karrtuttle.com

Steve W. Berman -

steve@hbsslaw.com, robert@hbsslaw.com, heatherw@hbsslaw.com

S Douglas Bunch - dbunch@cohenmilstein.com

Steven P Caplow -

stevencaplow@dwt.com, patrickwatts@dwt.com, sheilarowden@dwt.com, jason

Schattenkerk@dwt.com

Kevin P Chavous - kchavous@sonnenschein.com

James J. Coster - jcoster@ssbb.com, managingclerk@ssbb.com, jregan@ssbb.com

Hal D Cunningham - hcunningham@scott-

scott.com, halcunningham@gmail.com, efile@scott-scott.com

Kerry F Cunningham - kerry.cunningham@dlapiper.com

Leslie D Davis - ldavis@sonnenschein.com

Corey E Delaney -

corey.delaney@dlapiper.com, kerry.cunningham@dlapiper.com, richard.hans@dlapiper.com, patrick.smith@dlapiper.com

Joshua S. Devore - jdevore@cohenmilstein.com, efilings@cohenmilstein.com

Joseph A. Fonti - jfonti@labaton.com, ElectronicCaseFiling@labaton.com

Larry Steven Gangnes -

gangnesl@lanepowell.com, sebringl@lanepowell.com, docketing-sea@lanepowell.com, donnellyjoss@lanepowell.com

Jonathan Gardner - jgardner@labaton.com

Joseph P Guglielmo - jguglielmo@scott-scott.com, efile@scott-scott.com

Richard F Hans - richard.hans@dlapiper.com, dorinda.castro@dlapiper.com

David Daniel Hoff - dhoff@tousley.com, efile@tousley.com

Julie Hwang - jhwang@labaton.com, ElectronicCaseFiling@labaton.com

Geoffrey M Johnson - gjohnson@scott-scott.com, efile@scott-scott.com

Matthew B. Kaplan - mkaplan@cohenmilstein.com, efilings@cohenmilstein.com



1 Stellman Keehnel -stellman.keehnel@dlapiper.com,patsy.howson@dlapiper.com  
2 Paul Joseph Kundtz -  
3 pkundtz@riddellwilliams.com,mdowns@riddellwilliams.com,mbergquam@ri  
4 ddellwilliams.com  
5 Joel P Laitman -jlaitman@cohenmilstein.com  
6 Bruce Earl Larson -blarson@karrtuttle.com,psteinfeld@karrtuttle.com  
7 Mike Liles , Jr-mliles@karrtuttle.com  
8 Christopher E Lometti -clometti@cohenmilstein.com  
9 John D Lowery -jlowery@riddellwilliams.com,dhammonds@riddellwilliams.com  
10 Douglas C McDermott -doug@mcdermottnewman.com,eric@mcdermottnewman.com  
11 Bradley T. Meissner -bradley.meissner@dlapiper.com  
12 Timothy Michael Moran -  
13 moran@kiplinglawgroup.com,cannon@kiplinglawgroup.com  
14 Brian O. O'Mara -bomara@csgrr.com  
15 Barry Robert Ostrager -bostrager@stblaw.com,managingclerk@stblaw.com  
16 Nancy A Pacharzina -npacharzina@tousley.com,mhottman@tousley.com  
17 Kenneth J Pfahler -kenneth.pfahler@snrdenton.com,nicole.reeber@snrdenton.com  
18 Daniel B Rehns -drehns@cohenmilstein.com,efilings@cohenmilstein.com  
19 Kenneth M Rehns -krehns@cohenmilstein.com  
20 Julie Goldsmith Reiser -jreiser@cohenmilstein.com  
21 Serena Richardson -srichardson@labaton.com,ElectronicCaseFiling@labaton.com  
22 Rogelio Omar Riojas -  
23 omar.riojas@dlapiper.com,nina.marie@dlapiper.com,karen.hansen@dlapiper.com  
24 Darren J Robbins -e\_file\_sd@csgrr.com  
25 Tammy Roy -troy@cahill.com  
26 Joshua M. Rubins -jrubins@ssbb.com,managingclerk@ssbb.com,jregan@ssbb.com  
27 Stephen M. Rummage -steverummage@dwt.com,jeannecadley@dwt.com  
28 Hollis Lee Salzman -hsalzman@labaton.com,ElectronicCaseFiling@labaton.com  
Paul Scarlato -pscarlato@labaton.com,ElectronicCaseFiling@labaton.com  
Arthur L Shingler -ashingler@scott-scott.com,efile@scott-scott.com  
Gavin Williams Skok -gskok@riddellwilliams.com,dhammonds@riddellwilliams.com  
Richard A Speirs -rspeirs@cohenmilstein.com  
Kim D Stephens -  
kstephens@tousley.com,wcruz@tousley.com,cbonifaci@tousley.com  
Robert D Stewart -stewart@kiplinglawgroup.com,cannon@kiplinglawgroup.com  
Janissa Ann Strabuk -jstrabuk@tousley.com,wcruz@tousley.com

1 Steven J Toll -stoll@cohenmilstein.com,efilings@cohenmilstein.com

2 Mary Kay - Vyskocil mvyskocil@stblaw.com

3 Dennis H Walters -dwalters@karrtuttle.com,wbarker@karrtuttle.com

4 Adam Zurofsky -azurofsky@cahill.com

5 DATED this 18th day of July, 2011 at Seattle, Washington.

6 By s/ Brian C. Free

7 Brian C. Free, WSBA #35788  
8 1221 Second Avenue, Suite 500  
9 Seattle WA 98101-2925  
10 Telephone: (206) 623-1745  
11 Facsimile: (206) 623-7789  
12 Email: bcf@hcmp.com  
13  
14  
15  
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